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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAN ECKERMANN,

Plaintiff and Respondent,

v.

TERESIJA SIGMUND,

Defendant and Appellant.

B243455

(Los Angeles County
Super. Ct. No. SD030222)

APPEAL from an order of the Superior Court of Los Angeles County,
David J. Cowan, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.
Teresija Sigmund, in pro. per.; and Barry E. Cohen for Defendant and Appellant.
Dennis Smith; and Paula Kane for Plaintiff and Respondent.

Teresija Sigmund (wife) appeals an order denying her motion to vacate a default judgment of dissolution of marriage obtained by Jan Eckermann (husband).

On February 16, 2007, the trial court entered a default judgment of dissolution. On April 30, 2012, wife filed an order to show cause (OSC) to set aside the default judgment. Wife alleged husband acted fraudulently in securing a default judgment for divorce. Family Code section 2122 requires an action to vacate a judgment on the basis of fraud to be filed within one year of knowledge of the fraud.¹ Thus, for the OSC to be timely, wife would have had to learn of the alleged fraud during the one-year period preceding April 30, 2012. The trial court made a credibility determination that wife was aware of the divorce judgment more than one year before she filed the OSC.

We conclude the record supports the trial court's factual finding and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *In February 2007, husband obtains default judgment of dissolution.*

The parties were married in 1997 and had a child in 1998.

On April 6, 2006, husband filed a petition for dissolution of marriage, alleging the parties separated in August 2000, after two years and eight months of marriage.²

Wife was aware of the pendency of the dissolution proceeding. The record reflects, inter alia, on May 18, 2006, she stipulated to the appointment of a commissioner as judge pro tempore, and that she personally appeared in court at proceedings on May 18, 2006, July 6, 2006 and August 31, 2006.

¹ Family Code section 2122 provides in pertinent part: "The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following: [¶] (a) Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought *within one year after the date on which the complaining party either did discover, or should have discovered, the fraud.*" (Italics added.)

All further statutory references are to the Family Code, unless otherwise specified.

² The petition was personally served on wife at 10751 Wilshire Boulevard, suite 540, by a registered process server.

On January 30, 2007, pursuant to husband's request, the court clerk entered wife's default, wife having failed to respond to the petition.³ The matter proceeded by declaration (§ 2336) and a default judgment of dissolution was entered on February 16, 2007.

The judgment of dissolution provided for joint legal custody, with primary physical custody to mother. Husband was ordered to pay \$534 per month in child support. The trial court terminated jurisdiction to award spousal support to wife, and determined there was no community property.

The clerk mailed notice of entry of judgment to wife at 11246 Dorlington Avenue, Los Angeles, CA 90024.

It is undisputed that the request for entry of default and the notice of entry of judgment were not served on wife's then-current address. Wife did own a condominium in Brentwood, but its address was 11738 Darlington Avenue, Los Angeles, CA 90049.

2. Wife's OSC to modify child support.

On January 12, 2012, wife filed an OSC for modification of child support, attorney fees and for the determination and payment of arrears. Those proceedings are not the subject of this appeal.

3. Wife's OSC to set aside and vacate the default judgment.

On April 30, 2012, wife filed an OSC to set aside and vacate the default judgment, and for attorney fees. Wife asserted that although the original summons and complaint were duly served at her condominium at 10751 Wilshire Boulevard, unit 504, the subsequent papers were served at other addresses which were incorrect. As a result, wife did not receive any of the papers relative to the entry of default and default judgment. Wife argued this was a classic case of extrinsic fraud, in that husband effectively deprived her of her right to contest the merits of her claims, which include a claim to property rights, spousal support, and the duration of the parties' marriage.

³ The request for entry of default was served by mail, addressed to wife at 11246 Darlington Ave, Los Angeles CA 90024.

4. *Husband's opposition papers.*

In opposition, husband argued the matter is controlled by section 2122, which requires a motion to set aside a judgment to be brought within one year after the date the moving party discovered or should have discovered the actual fraud, perjury or failure to comply with disclosure requirements.

Husband's papers included a copy of a grant deed which wife executed on February 26, 2007, *ten days* after the default judgment of dissolution. Said deed, pertaining to a condominium at 1950 Cloverfield Boulevard in Santa Monica, stated "Teresija Sigmund, an unmarried woman who acquired title as a married woman as her sole and separate property [¶] hereby grant(s) to [¶] Teresija Sigmund, an unmarried woman," the above described real property. Thus, from the outset, wife was aware of the default judgment of dissolution.

Husband's papers also included a copy of a real estate loan application which wife completed on May 24, 2007. On the loan application, wife checked the box for "Unmarried (include single, divorced, widowed)."

In addition, husband asserted wife knew or should have known of the entry of judgment of dissolution of marriage because dependency court proceedings, commenced in July 2010, made it clear that husband had remarried and that a judgment of dissolution had been entered.

Husband requested sanctions against wife and her attorney for their bad faith actions and tactics in seeking to set aside the judgment of dissolution.

5. *Trial court's ruling.*

After hearing the matter and taking it under submission, the trial court ruled as follows:

"[Wife's] OSC was filed April 30, 2012. It is undisputed that the request for default and notice of entry of judgment were not served at [wife's] then current address. However, Family Code section 2122 requires that an action to set aside a judgment based on fraud be filed within one year of knowledge of the fraud. Here, therefore, for the OSC to be actionable, [wife] would have had to have learned of the fraud *after* April 30, 2011.

“Here, the alleged fraud by [husband] was in securing a default judgment for divorce. The entry of [wife’s] default was entered on January 30, 2007 and the judgment of divorce was entered on February 16, 2007. The Court finds the following related to [wife’s] knowledge of the divorce judgment:

“1. She executed a grant deed to certain real property as an ‘unmarried woman’ on February 26, 2007. [Wife’s] claim that this meant nothing, and was done only to make it easier to secure a loan was unconvincing.

“2. She signed a loan application in May, 2007 indicating she was not married.

“3. She was aware that [husband] had re-married (and hence necessarily that she was no longer married to him) by virtue of hearings on July 30, 2010 and October 4, 2010 she attended wherein [husband] and his subsequent wife, Fanny, sought a restraining order against [wife].

“[Wife’s] argument that she was not served with the divorce judgment in the dependency court case wherein that restraining order was sought is irrelevant. The issue is not service of the judgment but knowledge of the divorce. Where the issue is just ‘notice,’ not the truth of the underlying facts, [wife’s] argument that the Court cannot take the requested judicial notice of various matters in the dependency court file fails.

“The argument that the Court cannot take judicial notice of matters from the dependency court case because such matters are confidential was addressed by [husband’s] counsel not filing the referenced documents but rather presenting them to the Court in sealed envelopes — which the Court hereby requests counsel now retrieve and hold.

“The related argument that only her different dependency court counsel were served with documents that contained the judgment, not her, is again irrelevant where knowledge of an attorney is imputed to the client.

“Moreover, [husband] having re-married is not some obscure fact about which it might not be reasonable to assume [wife] was well aware of. It is not credible to the Court that [wife] did not know. The dependency court file is replete with references to [husband] having re-married.

“Further, independent of the dependency court file, [husband’s] new wife testified that the parties’ son lived with [husband] and her between September, 2010 and March, 2011 — which presumably [wife] was aware of and hence she was on further notice of no longer being married to [husband] by virtue thereof.

“Counsel’s argument that even if [wife] was aware she was divorced, she was not aware of its financial consequences (and in particular, loss of possible rights to spousal support and community property) (which the Court believes is unlikely), even if true (which was not established), again is irrelevant. The issue is only knowledge of the fraud; namely, securing the judgment. Moreover, she was on notice of the significance of a divorce judgment where the petition (which was served upon her correctly) specifically sought to terminate the Court’s ability to award spousal support and for a determination of property rights.

“Finally, [wife] does not deny she knew [husband] had re-married; her argument is only that [husband] has not proven this point.

“For these reasons, showing [wife] was aware of entry of a judgment for divorce *before* April 30, 2011, the OSC is barred by the statute of limitations.

“In making this finding, the Court is *not* making a finding related to the date of separation. Even if the parties reconciled, which the Court finds unlikely where [wife] had a child with someone else subsequent to when [husband] contends they separated, it does not change the foregoing facts showing they were still divorced — even if they might have still loved or had feelings for each other. The two are not mutually exclusive. Similarly, the unsupported claims related to continuing to have a joint bank account and [husband] paying for her health insurance are inconclusive. [Husband] denied knowledge of the joint bank account. Again, that parties are divorced does not mean all communications cease — particularly where as here there is a child of the marriage.

“In view of the foregoing, the Court does not need to reach the issue of whether [wife] satisfied the requirement of Family Code section 2121(b); namely, to show that vacating the judgment would in fact make a difference. The Court does not, however, deny the OSC on this ground.

“Whether [wife] has a claim for breach of fiduciary duty against [husband], where the judgment may not have specifically addressed that issue, is not now before the Court.

“[Wife’s] OSC, including her request for attorney’s fees, is therefore denied. [¶] [Husband’s] request for attorney’s fees as sanctions against [wife] is also denied.

On August 21, 2012, wife filed a timely notice of appeal from the order denying her motion to vacate the judgment.

CONTENTIONS

Wife contends: her lack of actual notice of the both the default judgment and the terms thereof constitutes reversible error; husband’s failure to comply with mandatory statutory disclosure requirements demonstrates that wife’s claims are not barred by the statute of limitations and constitutes an independent basis for reversal; the Welfare and Institutions Code strictly controls how dependency records can be used in other proceedings and husband’s actions which violated the confidentiality provisions of said code constitute reversible error; even if the proceedings from the dependency court were properly considered, they did not impart actual notice to wife; denial of the right to present live testimonial evidence including husband’s cross-examination was an abuse of discretion which requires reversal and remand for all testimony to be considered; and the trial court’s denial of wife’s request for attorney fees was reversible error.

DISCUSSION

1. *Trial court properly found wife’s motion to set aside the judgment was time-barred.*

a. *General principles.*

“In 1993, a chapter entitled Relief From Judgment was added to the Family Code. (§§ 2120-2129, added by Stats. 1993, ch. 219, § 108, pp. 1615-1617.) The statutory scheme authorizes an action or motion to set aside a dissolution judgment on specified grounds. (§§ 2122, 2125.) In adopting this chapter, the Legislature found ‘[t]he law governing the circumstances under which a judgment can be set aside, after the time for relief under Section 473 of the Code of Civil Procedure has passed, has been the subject of considerable confusion which has led to increased litigation and unpredictable and

inconsistent decisions at the trial and appellate levels.’ (§ 2120, subd. (d).) [¶] To that end, the Legislature specified in section 2122 the time within which to bring an action or motion to set aside a dissolution judgment based on fraud, perjury and other grounds.” (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143.)

Section 2122 provides in relevant part: “The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following: [¶] (a) Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud.”⁴

⁴ Prior “to the enactment of section 2120 et seq., the law recognized a distinction between extrinsic fraud, which was a basis for setting aside a judgment even after the expiration of the six-month period under Code of Civil Procedure section 473, and intrinsic fraud, such as perjury, which was not a valid ground for relief. [Citation.] ‘ “Extrinsic fraud occurs when a party is deprived of his opportunity to present his claim or defense to the court, where he was kept in ignorance or in some other manner fraudulently prevented from fully participating in the proceeding. [Citation.] Examples of extrinsic fraud are: concealment of the existence of a community property asset, failure to give notice of the action to the other party, convincing the other party not to obtain counsel because the matter will not proceed (and it does proceed). [Citation.] A party’s representation of the value of an asset, favorable to himself, does not constitute extrinsic fraud. [Citation.] . . . [¶] “Fraud is intrinsic and not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary, but has unreasonably neglected to do so. [Citation.] Such a claim of fraud goes to the merits of the prior proceeding which the moving party should have guarded against at the time. Where the defrauded party failed to take advantage of liberal discovery policies to fully investigate his or her claim, any fraud is intrinsic fraud. [Citation.]” [Citation.]’ [Citation.]” (*Rubenstein v. Rubenstein*, *supra*, 81 Cal.App.4th at p. 1144, fn. 7, italics omitted.)

b. *Standard of appellate review.*

We review the trial court's decision in ruling on the motion to set aside the judgment to determine whether the trial court abused its discretion. (*In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1346.)

c. *No abuse of discretion in trial court's ruling.*

On this record, the trial court properly found wife waited more than one year after learning of the judgment of dissolution before moving to set it aside.

Specifically, on February 26, 2007, *ten days* after the default judgment of dissolution, wife executed a grant deed in which she acknowledged she was no longer married. Said deed, pertaining to a condominium at 1950 Cloverfield Boulevard in Santa Monica, stated "Teresija Sigmund, an unmarried woman who acquired title as a married woman as her sole and separate property [¶] hereby grant(s) to [¶] Teresija Sigmund, an unmarried woman," the above described real property. Thus, wife admittedly knew from the inception that she now was divorced.

Additionally, wife completed a loan application on May 24, 2007, wherein she checked the box for "Unmarried (include single, divorced, widowed)."

It took wife another five years, until April 30, 2012, to file her OSC to set aside the default judgment.

Accordingly, we perceive no abuse of discretion in the trial court's determination that wife's OSC was untimely.

d. *Unnecessary to address the impact of dependency court proceedings.*

Husband, as well as the trial court, also relied on the 2010 dependency court records to establish wife knew of the dissolution judgment more than one year before she moved to set it aside.

Because the February 2007 grant deed and the May 2007 loan application are more than sufficient to show wife knew she was divorced, it is unnecessary to address the impact of the subsequent dependency court proceedings on wife's attempt to set aside the dissolution judgment.

2. *No merit to wife's contention the trial court abused its discretion in refusing to hear live testimony at the hearing.*

In reliance on *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, wife contends the trial court erred in denying her right to present live testimonial evidence at the hearing.⁵ Specifically, she contends she was denied the right to cross-examine husband.

The reporter's transcript of the June 18, 2012 hearing on the OSC reflects the parties were present in court and were represented by their respective counsel. After hearing arguments of counsel, the trial court inquired: "Is there anything either one of you feel you need to take me before I take it under submission?" After husband's attorney spoke, the trial court asked Barry Cohen, wife's attorney, as follows: "If there is anything further you need to argue? . . . So anything else you want to say?"

In the course of his argument, attorney Cohen stated: "I've never been able to cross-examine [husband] on anything. . . . I should have a right to cross-examine [husband] before any adverse decision on the default set aside is made."

The trial court interjected, "*Hold on. You lose if your client was on notice more than a year before you filed.*" Cohen replied, "*Yes, I agree.*" (Emphasis added.)

Section 217 requires the trial court to receive live testimony that is *relevant*. (*Id.* subd. (a).) The trial court's determination that wife was on notice more than one year before she filed the OSC rendered husband's cross-examination irrelevant. As indicated, wife admittedly was aware in February 2007 that she was divorced. Therefore, the trial court did not err in refusing to entertain cross-examination of husband.

⁵ Section 217, added in 2010, provides in relevant part: "(a) At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), *the court shall receive any live, competent testimony that is relevant* and within the scope of the hearing and the court may ask questions of the parties." (Italics added.)

3. *No merit to wife's contention she should have been awarded attorney fees.*

Attorney fees rulings are reviewed for an abuse of discretion. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1166.) Guidance concerning the use of the trial court's discretion is found in section 2032, which provides in pertinent part: "(a) The court may make an award of attorney's fees and costs under Section 2030 or 2031 where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties. [¶] (b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320 *Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.*" (Italics added.)

Further, "in determining whether to award attorney fees to one party, the court may also consider the other party's trial tactics. [Citation.]" (*In re Marriage of Drake, supra*, 53 Cal.App.4th at p. 1167; accord, *In re Marriage of Sorge* (2012) 202 Cal.App.4th 626, 662.)

Having reviewed this record, it is clear to this court that wife's OSC to set aside the judgment of dissolution was utterly and completely without merit. The grant deed which wife executed in February 2007, ten days after the judgment of dissolution, establishes that wife admittedly was aware from the outset of her divorced status. Although the trial court denied husband's request for sanctions, on this record, the imposition of sanctions would not have been an abuse of discretion. Given the patently unmeritorious nature of the OSC, the trial court properly refused to award wife attorney fees, irrespective of her financial circumstances.

DISPOSITION

The June 22, 2012 order denying wife's OSC, including her request for attorney fees, is affirmed. Husband's request for attorney fees on appeal is denied. Husband shall recover his costs on appeal.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.